SUMMARY

The Small Cable Business Association ("SCBA") amplifies its initial comments with respect to definition of small cable businesses and responds to other comments that impact small cable issues in this vital rulemaking.

Small Cable Definitions

The Commission must permit liberal access to capital to ensure the continued health of small cable. To accomplish this, the Commission must carefully determine the types of relationships that will lead to disqualifying "affiliations" with larger investors or creditors. The Commission must permit operators to obtain passive equity investments in small cable without resulting in any attribution. Passive equity investments must include all non-voting interests and all insulated limited partner interests regardless of the percentage of equity held.

Where the ability to influence the day-to-day operations of the business exists, the Commission should determine the active or passive nature of the investment applying the same tests used to determine the existence of *de facto* control. If the investor actively manages its investment, the Commission should use, at a minimum, the PCS *Control Group Minimum 50.1 Percent Equity Option* that permits unrestricted investment of up to 49.9% by larger entities without losing special small business bidding preferences.

Small System Deregulation

Transition rules must provide adequate stability to avoid the financial chaos created by "instant regulation" when a small operator exceeds its size limits. The Commission should adopt the transition methods proposed by various commenters.

To further reduce unnecessary regulatory burdens, the Commission should remove the uniform rate requirement from deregulated small cable.

Effective Competition

SCBA continues to support use of a Title I affiliation definition to determine if a multichannel video programming distributor is affiliated with a LEC. A low affiliation threshold must exist to reflect the disparate level of resources between a cable operator and a LEC. The statute does not support the efforts by some commenters to require penetration or other numeric thresholds before effective competition will exist.

Technical Preemption

Some local franchise authorities ("LFAs") urge the Commission to upend the preemption of LFA regulation of customer premises equipment and transmission technology. This preemption provides essential protection for small cable against unreasonable demands for financially unviable upgrades for small systems

Subscriber Notices

Separately processed written subscriber notices can represent a high cost to small cable. The reduced federal compliance requirement helps balance the interests of operators and subscribers. The Commission should clarify that LFAs cannot impose more stringent requirements.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)))))	CS Docket No. 96-85

REPLY COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

I. INTRODUCTION

The Small Cable Business Association ("SCBA"), through counsel, files these comments to assist the Commission in its consideration of crucial regulation implementing the provisions of the Telecommunications Act of 1996 ("Act") as it relates to small cable systems and small cable companies. These comments supplement SCBA's initial filing with additional analysis, more detailed proposals and responses to comments filed by others in this Docket. SCBA is well known to the Commission as a participant and strong advocate over the past three years for the needs and concerns of small cable in most rulemaking proceedings implementing the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").

SCBA grew from a grass-roots effort by small operators to cope with the onerous burdens imposed by the Commission's implementation of the 1992 Cable Act. From the meeting of small operators in May 1993 where SCBA was spontaneously formed, SCBA has grown into a proactive force, currently having over 350 members.

II. THE SMALL CABLE OPERATOR AFFILIATION RULES MUST PRESERVE ACCESS TO CAPITAL

A. The Commission should adopt an active/passive affiliation test and a higher percentage standard for active interests.

The Commission's small cable affiliation rules will be critical to SCBA members. These rules must preserve the benefits of deregulation intended by Section 301(c) while protecting small cable operators' access to capital. SCBA further details below a framework that achieves this objective. The framework draws a bright line between passive and active investments. This will preserve access to institutional investors and other investors that do not participate in day-to-day system management.[1] The framework also uses the *Control Group Minimum 50.1 Percent Equity Option* from the Commission's C block PCS auction rules to govern affiliation standards for active investments.

The affiliation standards for small cable should not follow the more restrictive rules of broadcast affiliations and other cross-ownership restrictions. The concern here is not control over programming decisions or the programming marketplace.[2] The focus of Section 301(c) is to provide

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[1]The Commission has a pending rulemaking in which it proposes increasing the allowable non-attributable percentage of institutional investment in recognition of the trend towards increasing use of institutional investors as a major source of capital. *Notice of Proposed Rulemaking*, In the Matter of Review of the commission's Regulations Governing Attribution of Broadcast Interests, MM Docket Nos. 94-150, 92-51, 87-154 (released January 12, 1995) ("*Broadcast NPRM*") at ¶ 50.

[2]For example, the cable/broadcast network cross-ownership affiliation standards were designed to "identify those ownership thresholds that enable an entity to influence or control management or programming decisions (for broadcasters), or the programming marketplace...." *Broadcast NPRM* at ¶ 27. Similarly, the broadcast affiliation standards are designed to identify "those ownership thresholds that enable an entity to influence or control programming or other core

the benefits of deregulation for entities not controlled by large entities. Consequently, the PCS C block rules provide an ideal model. Like those rules, the small cable affiliation rules must maintain the benefits of deregulation for the smaller operators while still enabling such operators to attract capital from investors for system upgrades, service improvements and growth. The 20% equity ownership/*de jure* control test will fail this objective. SCBA details a more appropriate set of standards below.

B. In the absence of *de facto* control, active investment interests below 50% should not give rise to attributable interests for affiliation purposes.

Where exercised voting interest or other indicia of control are involved, the Commission must exclude from attribution at least all interests below 50%. The Commission should follow the principles developed in its PCS C block auction rules. In those rules, the Commission granted special auction privileges to small business and entrepreneurs. To avoid large entities using small businesses as a front to gain bidding preferences, the Commission placed restrictions on equity ownership. These goals are identical to those of Congress in Section 301(c); avoid providing large companies with the benefits of small cable's reduced regulatory burden.

The Commission developed the *Control Group Minimum 50.1 Percent Equity Option* as part of its PCS C block auction rules.[3] Under this option, the Commission focuses on the level of ownership and control of qualified investors. So long as the qualified investors own a minimum of 50.1% of the equity and voting power, the interests of all other investors will not give rise to any

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decisions." *Id* at ¶ 26.

[3] *Fifth Report and Order*, In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253 (released July 15, 1994) at ¶116.

affiliations. This means that a large non-qualified investor may own up to 49.9% of the equity and voting power, without giving rise to an affiliation that would disqualify the company from taking advantage of bidding preferences.[4] The Commission offered the *Control Group Minimum 50.1 Percent Equity Option* to enhance small entities' ability to attract capital and provide maximum flexibility to structure the entity.

Even though the goal of capital attraction is the same, the Commission has adopted much more stringent guidelines with respect to small cable. At a minimum, the Commission should put small cable on par with small PCS by allowing small cable active large company investments up to at least 49.9 percent without giving rise to any attribution. SCBA urges the Commission to further refine this option to measure solely voting power, not percent of equity ownership.

C. Certain types of relationships should qualify as passive interests regardless of the degree of equity ownership.

The Commission should exempt passive interests from any attribution that would give rise to an affiliation. Specific types of investments should always be treated as passive. The Commission must identify such passive investments and establish safe harbors to create certainty that will encourage investment in small cable. The Commission should also allow waivers or special declaratory rulings for those relationships that do not squarely fall within the passive safe harbors suggested by SCBA.

1. Non-Voting Equity Investors.

Because stockholders owning only non-voting stock have no direct voice or influence over the operation of the cable operator, these interests should never give rise to an "affiliation,"

[4] 47 C.F.R. § 24.709(b)(4).

regardless of the percentage of equity held. Even in the low-threshold broadcast affiliation context, holdings of non-voting stock, including many preferred stocks, the Commission has determined that attribution is not appropriate:

> Non-voting stock provides significant benefits as an investment/capitalization mechanism; it specifically precludes the direct means (i.e., by voting) to influence or control the activities of a corporate licensee, but allows investors to acquire sufficient equity to compensate for their risk. Moreover, non-voting stock is not considered to be a cognizable interest until such time as the conversion right is exercised. If the contingency upon which the conversion right rests is beyond the control of the stockholder, we determined that attribution is not appropriate because the shareholder has no apparent ability to control or influence the licensee corporation. However, even if the conversion right is within the shareholder's ability to effectuate, until the shareholder actually acquires the power to vote, the current rules presume that he should not be able to exercise impermissible influence or control over a licensee.[5]

Congress only required that affiliations with certain large entities would disqualify the operator from small cable relief. Unlike, for example, 47 U.S.C. § 310(a)(2) that restricts alien "ownership" of an entity based on an analysis of *all* equity, Congress did not require the entire ownership structure to factor into the analysis of whether an "affiliation" exists. Consequently, the Commission can and should ignore investments by those who have no legal right to exercise influence over the day-to-day operations of the business. The Commission should apply similar non-attribution rules to non-voting interests in small cable.

2. Insulated partnership interests.

Similar to the non-voting corporate shareholder, a partner sufficiently insulated from exercising material involvement, directly or indirectly, in the management or operation of the partnership's media related activities should not result in attribution of that partner's interests.

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[5] *Broadcast Ownership NPRM* at ¶ 52; 47 C.F.R. § 73.3555, Note 2(f).

a. Qualifying insulated interests.

The Commission has developed rules to identify the attributes that give rise to an insulated limited partner of broadcast licensees. These "insulation criteria" include:

(1) The limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the media enterprises of the company;

(2) The limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises;

(3) The limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its business;

(4) The rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions;

(5) The limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction or is removed for cause as determined by a neutral arbiter;

(6) The limited partner may not perform any services for the partnership materially relating to its media activities, except that a limited partner may make loans to or act as a surety for the business; and

(7) The limited partner may not become actively involved in the management or operation of the media business of the partnership.[6]

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[6] *Memorandum Opinion and Order on Reconsideration*, In the Matter of Corporate Ownership Reporting and Disclosure by Broadcast Licensee, MM Docket No. 83-46 (released October 23, 1986), 1 FCC Rcd 802.

b. Other partnership structures that provide sufficient insulation.

The Commission should also take into consideration a number of exceptions to the general insulation criteria that are currently under review by the Mass Media Bureau. These exceptions would allow certain partnership structures to result in sufficiently isolated partners, even though the structure does not strictly conform to the foregoing criteria.

(1) Business Development Companies.

The Commission should allow the use of Business Development Companies ("BDC") that seek to become involved in small cable.[7] BDC's do not qualify under the insulation criteria, however, because both federal and most state security regulations require limited partners to have the right to vote on the election and removal of general partners. So long as individual limited partners do not possess sufficient voting power to control the outcome of such balloting, the mere presence of this attribute should not disqualify the entity from potential small cable treatment.

(2) Widely-held limited partnership interests.

Similarly, where many limited partners exist who do not otherwise meet the insulation criteria but whose interests represent an insignificant percentage of the total partnership, those interests should not result in affiliation. The Mass Media Bureau has a similar rule under consideration regarding broadcast affiliations.[8]

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[7]BDC's facilitate transitional and intermediate financing of developing or financially troubled companies. They are structured as limited partnerships to receive favorable tax treatment. BDC's are regulated under the Investment Company Act of 1940. 15 U.S.C. §80a-2(48).

[8]*Broadcast Ownership NPRM* at ¶ 57.

3. Investments made through companies governed by the Investment Company Act of 1940 should qualify as passive investments.

Small cable raises capital through entities acting as investment pools pursuant to the Investment Company Act of 1940.[9] Under the Investment Company Act, the individual investors provide money to either a registered investment company or an "accidental" investment company, both of which are subject to regulation under the Act. The Investment Company Act allows for the pooling of funds which are then reinvested by the fund mangers. The pooling of funds in the investment company ensures that the investor maintains a passive interest in the operation of the company. Similarly, an investment company has no authority under the law to take control of another company. Consequently, the fund managers may not legally exercise control over the company in which it invests its funds.[10] Therefore, investments in small cable by qualified or "accidental" investment companies should always be treated as either passive or non-controlling and should never give rise to an attributable interest.

4. Factors to consider when classifying investments as active or passive.

a. Exclude all voting interests below 50% unless shareholder exercises control.

The existence of *de jure* control should not independently require automatic attribution of ownership interests. Rather, the Commission should rely on a *de facto* control test because a minority shareholder can exercise *de facto* control, even though another shareholder has *de jure* control.

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[9] 15 U.S.C. §80a, *et. seq.*

[10] *Securities and Exchange Commission v. Fifth Ave. Coach Lines, Inc.*, 289 F. Supp. 3 (D.C.N.Y. 1968) *affirmed* 435 F.2d 510.

Operators should compute the existence of *de jure* control using only currently outstanding voting securities. It should not include the impact of future redemption rights.[11] If the investor with *de jure* control has not acted to exercise its control rights, the investment should be considered passive and no affiliation should result. For the reasons set forth in SCBA's Comments,[12] the Commission should exclude truly passive investments from all attribution requirements.

The Commission should adopt the *de facto* control standard. The *de facto* control test "transcends formulas, for it involves an issue of fact which must be resolved by the special circumstances presented."[13] The Commission should rely on the *de facto* control standard to determine whether an interest should be attributed for affiliation purposes. In many previous cases, the Commission has identified cases of *de facto* control, even where another party had *de jure* control.[14] The Commission recently highlighted this relationship between the two control tests when it decided the question of whether Fox Television Stations ("FTS"), a second-tier subsidiary of an Australian parent ("News Corp."), was controlled by News Corp. or by Rupert Murdoch, a naturalized United States citizen. In finding that Murdoch exercised *de facto* control, even though News Corp. held *de jure* control, the Commission explained the importance of *de facto* control:

> Indeed, News Corp 's investment appears to have been passive. Although FTS has held its licenses for nearly a decade under the present ownership structure, there is no evidence before us that News Corp. has ever exercised or even sought to exercise control of FTS....We have held that a showing of *de facto* control must rely on facts

[11] *Memorandum Opinion and Order*, In re Applications of Univision Holdings, Inc. And Perenchio Television, Inc., (released September 30, 1992), 7 FCC Rcd 6672 ("*Univision*") at 6674.

[12] SCBA Comments at 13.

[13] *Univision* 7 FCC Rcd at 6675.

[14] *See, e.g., Memorandum Opinion and Order*, In re Application of Fox Television Stations, Inc., File No. BRCT-940201KZ (released May 4, 1995) ("*Fox*").

> and events that have occurred and not on speculation as to what might occur in the future. . . .More particularly, in the absence of any "extrinsic evidence that a financier's leverage has manifested itself in the actual operations of a licensee, we can [not] find improper *de facto* control." (Citations omitted).[15]

The Commission should exclusively rely on the *de facto* control test to determine whether an investment is active or passive. An ability to control, if not exercised, should not give rise to a disqualifying affiliation. Specific determinations of whether one or more investors with *de jure* control (e.g. multiple general partners) actually exercise *de facto* control should be determined on a case by case basis. For example, a partnership with multiple general partners may consist of one partner exercising *de facto* control, while the other partners' participation constitutes mere oversight, similar to that discussed in the following section.

b. Oversight activities.

Many institutional investors require the right to oversee the results of operations as a condition to providing debt or equity to a small operator. The extent of oversight varies depending upon the terms negotiated between the parties. Many forms of oversight involve nothing more than occasional periodic meetings with senior management to review the financial performance of the operator compared to its business plan. Such "oversight" should be more accurately termed "investment performance review," a normal investment monitoring activity. Mere oversight should not change the passive nature of an investment and should never give rise to an attributable interest.

Some oversight arrangements will cause the investor/creditor to become more actively involved in the details of the business operation, without necessarily exercising control or influence over day-to-day business operations. Again, these activities should not automatically cause the

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[15] *Fox* at ¶ 160.

investment to lose its "passive" designation. Rather, those relatively few oversight arrangements that become more involved in the operation of a cable operator should be subject to case by case determination by the Commission.

c. Investor representatives on Boards of Directors

Some significant investors, even if they remain passive with respect to the day-to-day operations of the cable system will require a representative seated on the Board of Directors. The placing of persons on the Board of Directors should not change the passive nature of the investment. Each Board representative still has only one vote and cannot control the board, so long as the investor has minority representation. Further, the Board sets policy and is not involved in the day-to-day operations of the cable operator. Consequently, having a minority of Board members representing investors/creditors should not cause attribution of those interests.

5. Establishing qualification of insulated or passive interests.

Because of the number of different factors involved in determining whether an isolated interest exists, the Commission allows broadcasters to file an affirmative certification that the limited partners satisfy the insulation criteria.[16] The Commission should adopt similar simple mechanisms to allow an operator to document compliance should the qualification of a small cable operator be called into question.

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[16] 47 C.F.R. §73.3555.

III. SMALL SYSTEM DEREGULATION

A. Transition issues.

The Commission must reject the argument of at least one LFA that "instant rate regulation" should result when a small operator exceeds size or affiliation limits.[17] This position represents the epitome of insensitivity to the need for rate stability and certainty.

Access to capital remains a critical issue for small cable. The *Small System Order* has helped smaller operators obtain the rate flexibility and stability necessary to attract investors. The greater deregulation in Section 301(c) provides additional relief. Small operators on the margin of deregulation will lose these benefits if they are subject to "instant regulation" when such systems exceed the small operator limits. These operators could no longer assure investors of rate stability. Equally important, subscribers would face repeated rate changes as the systems bounce in and out of rate regulation In some cases, this may occur due to *no* growth in the system, but rather a reduction in national cable subscribers that places a company above the 1% standard.

The Commission should adopt transition rules like those proposed by several commenters.[18] Transition rules should provide at least for grandfathering of existing rates with future increases governed by regulations then in effect. This mechanism has served small cable and subscribers adequately under Form 1230 rate regulation. By adopting such transition rules, the Commission will succeed in "streamlining its processes [and] establishing certainty for cable operators, LFAs and subscribers."[19]

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[17] City of Fairfield Comments at 2.

[18] CATA Comments at 6-7; Falcon Holding Co. Comments at 5-6; SCBA Comments at 9-11.

[19] *NPRM* at ¶ 68.

In both the *Small System Order* and the *Thirteenth Order on Reconsideration*, the Commission has recognized the importance of rate stability to cable operators and subscribers.[20] Congress did not enact Section 301(c) intending to increase uncertainty and rate instability, what CATA aptly describes as transition "chaos."[21] The Commission will avoid such results by adopting rules that avoid instant reregulation and the resultant disruption.

B. The status as a "small cable company" has long-term implications.

Some commenters mistakenly suggest that the status as a "small cable company" should be given less consideration by the Commission because the definition becomes moot in 1999. This assertion is <u>inaccurate</u> for certain basic only systems.

Section 301(c) deregulates the basic tier rates of certain basic-only small systems. This deregulatory benefit will continue indefinitely until Congress acts to amend the statute. Consequently, the definition of a "small cable company" becomes vitally important to this group of small cable operators. The Commission must act carefully to ensure that those entities that Congress intended to deregulate fall within the definitional parameters that the Commission establishes.

C. Uniform rate requirement.

SCBA asks the Commission to remove the uniform rate requirement from deregulated small cable operators.[22] This will ease the burdens of regulation and benefit small operators and subscribers by permitting additional rate flexibility. Small cable companies face increasing

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[20] *Small System Order* at ¶73; *Thirteenth Order on Reconsideration* at ¶ 8.

[21] CATA Comments at 6-7.

[22] SCBA Comments at 40-41.

competition from national MVPDs like American Telecasting, DirecTV and others. These MVPDs are not subject to the uniform rate requirement. MVPDs are beginning to use the uniform rate requirement as a means to suppress small cable's attempts to compete through introductory and promotional offerings. A case currently pending before the Cable Services Bureau demonstrates this problem for small cable.[23]

In considering this means to ease regulatory burdens, the Commission should note the comments of the New York Department of Public Service:

> The Commission does not consider whether deregulation of small operators without a specific finding of the existence of effective competition relieves such operators from the uniform rate or tier buy-through provisions of the Act. . . [R]eference to the legislative history supports a determination that deregulation of small operators is tantamount to an express finding that such operators are subject to effective competition. In this regard, the House Report provides: "[i]mposing a uniform rate structure requirement on services that are not regulated is unnecessary, since, in those instances, market forces are actively working to ensure reasonable rates." (H.R. Rep., No. 204, 104th Cong., 1st Sess. (1995) at 109) (emphasis added).[24]

SCBA supports the analysis of NYDPS, an experienced state franchising authority. Removal of the uniform rate requirement from otherwise deregulated small operators will ease regulatory burdens, enhance small cable's ability to compete with other MVPDs and effectuate the intent of Congress.

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[23]Tri-Lakes Cable, Monument CO, Petition for a Determination of Effective Competition, CSR No. 4724-E. In this case, American Telecasting claims that the petitioner's marketing campaign violates the uniform rate requirement. American Telecasting is vigorously resisting the small operator's attempts to obtain a straightforward effective competition determination.

[24]New York Department of Public Service ("NYDPS") Comments at 29 (emphasis added).

IV. EFFECTIVE COMPETITION

A. Definition of "affiliate".

SCBA supports application of the Title I definition of "affiliate" for the purposes of identifying a LEC-affiliated multichannel video programming distributor ("MVPD"). The Commission's analysis and the analyses of several commenters show that the Commission has discretion to apply the Title I definition to the LEC effective competition test, and that it is appropriate to do so.[25] It is especially important to small cable that the Commission's rules reflect the fundamental difference in LEC investment in a competing MVPD.

The Commission should find the interpretation of the New York Department of Public Service particularly balanced and persuasive:

> We agree with the Commission's tentative conclusions in paragraph 16 of the Order that the 1996 Act definition, which generally defines a LEC affiliate as one in which a LEC holds greater than ten percent equity stake, should be used for purposes of the new effective competition test. . .
>
> . . . Congress has emphasized the identity of the competitor -- as opposed to the scope or success of the competitive programming venture -- as the dispositive element in determining the impact on subscribers.
>
> There is a reasonable basis for this conclusion. As a general rule, a LEC will have resources far in excess of the resources available to an existing cable operator. Also, at this time, a LEC can be expected to be connected to any part of its service territory as compared to an average of 60% connects for a cable operator.[26]

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[25] NPRM at ¶¶ 16, 77; CATA Comments at 3; Massachusetts Cable Television Commission ("MCTC") Comments at 6; NYDPS Comments at 8; Cox Communications Comments at 13-16; Time Warner Cable Comments at 2-11; Comcast Comments at 13-17; NCTA Comments at 13-20.

[26] NYDPS Comments at 8-9 (emphasis added).

Additionally, as suggested by NYDPS, the Massachusetts Cable Television Commission and several other commenters, the Commission should aggregate LEC interests and include passive interests and broadly defined beneficial ownership interests in the 10% test as well.[27]

The Commission should also note carefully the comments of those already actively competing with LEC-affiliated MVPDs.[28] These comments from the front lines of competition support a 5% affiliation test reinforced with an active control standard. If the Commission does not adopt these standards outright, it should provide for a case by case adjustment to the 10% affiliation test.

The few commenters that resist adoption of the Title I affiliation definition here fall into two categories — MVPDs that will gain competitive advantage from continued rate regulation of cable operators[29] and isolated LFAs seeking to perpetuate their authority. [30] None of these commenters squarely address the pro-competition, deregulatory thrust of the 1996 Act. None of these commenters acknowledge the intense LEC-driven MVPD competition already underway.

The comments of the Massachusetts Cable Television Commission align more precisely with Congressional intent:

> [I]mmediate rate deregulation as triggered by the new effective competition prong would merely unshackle a cable operator from regulations which continue to

[27]MCTC Comments at 6; NYDPS Comments at 8-9; Cox Communications Comments at 16; New England Cable Television Association Comments at 3-10; Time Warner Cable Comments at 4, 7-11.

[28]See generally CCTC Comments; Cole, Raywid & Braverman Comments at 6-8; Time Warner Cable Comments at 6-13.

[29]Residential Communications Network Comments at 2-7; USTA Comments at 10.

[30]New York City Dept. of Information Technology and Telecommunications Comments at 8-12.

> restrict it from availing itself of marketing, programming and rating options already available to its competitors.[31]

These comments should guide the Commission in defining "affiliate" for the purposes of LEC effective competition.

B. No penetration test.

SCBA supports the analyses of the Section 301(b)(3) of the 1996 Act as *not* requiring a penetration or past test.[32] As stated by the Massachusetts Cable Television Commission:

> Congress intended the fourth effective competition prong to be met when a LEC or its affiliate offers multichannel video programming to subscribers in any portion of a franchise area, even if the service is actually provided on a very limited basis. Because such a presence would trigger subscriber interest, and hence threaten an operator's market share, that presence alone may restrain cable rates. It would appear that if Congress was concerned about the extent of market availability or penetration of video services offered by a LEC in a given franchise, it would have made at least some reference to it when the provision was drafted. Consistent with the statutory language, we would urge the Commission to refrain from adopting its own minimum market thresholds without specific direction from Congress in this area.[33]

These comments of an experienced state regulatory body provide a credible and persuasive analysis. The few commenters that argue for a penetration test are either competing MVPDs seeking to gain advantage through perpetuation of rate regulation;[34] or isolated LFAs resisting replacement of their authority by market forces.[35] Their arguments collide with the language of

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[31]MCTC Comments at 3.

[32]*NPRM* Separate Statements of Commissioner Quello and Commissioner Chong; MCTC Comments at 3; NYDPS Comments at 9.

[33]MCTC Comments at 3 (emphasis added).

[34]Optel Comments at 2-4.

[35]City of Indianapolis Comments at 3; New Jersey Board of Public Utility Comments at 3-4.

the statute and the fundamental difference of competition from a LEC affiliated MVPD. The Commission should keep its interim rule.

V. TECHNICAL PREEMPTION

The comments of certain LFAs on Section 301(e) seek to circumvent the preemption of LFA regulation of customer premises equipment and transmission technology. SCBA is especially concerned by this effort because small cable operators are at a significant economic disadvantage in negotiating franchise renewal issues with LFAs. Small cable operators do not have the resources to pay consultants, lawyers and others to negotiate or even litigate renewals where the LFA demands significant upgrades in equipment and transmission technology. Section 301(e) now makes such infrastructure decisions market driven.

Some LFA commenters advocate that this preemptive provision should not apply to franchise renewals. "LFAs therefore should not be restricted in their ability to negotiate and franchise technical standards for operators."[36] Some LFAs argue that system architecture and channel capacity are fair game in the franchise process.[37] According to the City of Indianapolis, this is because "It is in actuality, the LFAs who are the impetus for the deployment of new technology, subscriber happiness and competition."[38]

In light of the increasing confidence and reliance on the marketplace to meet consumer demand for video programming and telecommunications services, these statements are regulatory anachronisms. The Commission can add significant certainty to the franchise process by

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[36]City of Indianapolis Comments at 4.

[37]City of Denver comments at 16-17.

[38]City of Indianapolis Comments at 4.

explicitly interpreting Section 301(e) as preempting LFA attempts to mandate technical standards in franchise negotiations or otherwise.

VI. SUBSCRIBER NOTICES

Section 301(g) of the 1996 Act makes clear that "a cable operator may provide notice of service and rate changes to subscribers using any reasonable means at its sole discretion." The *NPRM* recognizes this as a self-effectuating statutory mandate.[39] The comments of one LFA seek to undermine this provision at the local level.

> [T]he the Commission should clarify as soon as practicable that the discretion given to cable operators to provide notice of certain changes by 'any reasonable means,' while binding on the commission for purposes of its statutorily mandated minimum standards, is not preemptive of State and local requirements that may require written notice by specific means, e.g. on subscriber billing statements or as inserts in subscriber bills, whether such requirements are contained in cable franchises or in separate state or local laws or regulations.[40]

Small cable is especially concerned that some LFAs will recreate, and even increase, the subscriber notice compliance burdens just removed by Congress and the Commission.

Subscriber notice requirements are particularly burdensome on small cable operators. Limited administrative resources and lack of economics of scale result in significantly higher unit costs for envelope stuffers and other means that LFAs may mandate. Newspaper advertisements and written announcements on the cable system provide a more efficient means to provide such notice. There is no evidence before the Commission that such notice in any way adversely impacts the public interest. The Commission should clarify for LFAs that the words "any

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[39] *NPRM* at ¶ 38-39.

[40] NYDPS Comments at 14-15.

reasonable means at its sole discretion" preempt local regulators from imposing additional notice requirements.

VII. CONCLUSION

As indicated in these Comments, the Commission can implement the Act in a manner that provides meaningful relief to small cable. SCBA has outlined the pitfalls the Commission should avoid and has provided concrete suggestions for substantive and procedural regulations. SCBA remains ready to provide the Commission with any additional information to assist in the proper implementation of the Act's small cable provisions.

Respectfully submitted,

Eric E. Breisach
Christopher C. Cinnamon
Kim D. Crooks
Howard & Howard
107 W. Michigan Ave., Suite 400
Kalamazoo, Michigan 49007
(616) 382-9711

Attorneys for the
Small Cable Business Association

June 28, 1996
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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	**CS Docket No. 96-85**
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CERTIFICATE OF SERVICE

I, Carol L. Malmud, a secretary in the law firm of Howard & Howard, do hereby certify that on this 28th day of June, 1996, I have caused a copy of the foregoing **SMALL CABLE BUSINESS ASSOCIATION'S REPLY COMMENTS** to be served via first-class United States Mail, postage prepaid, upon the persons lised on the attached service list.

Carol L. Malmud

Carol L. Malmud

***Via Hand-Delivery**

*The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street NW, Room 814
Washington, DC 20554

*The Honorable Susan P. Ness
Commissioner
Federal Communications Commission
1919 M Street NW, Room 832
Washington, DC 20554

*The Honorable James R. Quello
Commissioner
Federal Communications Commission
1919 M Street NW, Room 802
Washington, DC 20554

*The Honorable Rachelle B. Chong
Commissioner
Federal Communications Commission
1919 M Street NW, Room 844
Washington, DC 20554

Jill A. Lesser
People for the American Way
2000 M Street NW
Washington, DC 20036

Gigi B. Sohn
Andrew J. Schwartzman
Joseph S. Paykel
Media Access Project
2000 M Street NW
Washington, DC 20036

David Cosson
L. Marie Guillory
National Telephone Cooperative Association
2626 Pennsylvania Avenue NW
Washington, DC 20037

Gary M. Jackson
Assistant Administrator for Size Standards
U.S. Small Business Administration
409 Third Street SW
Washington, DC 20416

Betsy Strauss, City Attorney
Marci Coglianese, Assistant City Attorney
City of Fairfield, California
1000 Webster Street, Room 407
Fairfield, CA 94533

Deborah T. Poritz
Attorney General of New Jersey
James Eric Andrews
Deputy Attorney General
State of New Jersey
P.O. Box 45029
Newark, NJ 07101

Curtis T. White
Allied Communications Group, Inc.
4201 Connecticut Avenue NW, Suite 402
Washington, DC 20008

Mitchell K. Wyatt, Esq.
Jonathan L. Kramer, FIAE
General Counsel
Kramer Monroe & Wyatt, LLC
16350 Ventura Blvd., Suite 5100
Encino, CA 91436-2116

William A. Cook, Jr.
3008 Lofton Road SW
Roanoke, VA 24018

Rick Maultra
Telecommunications Coordinator
City of Indianapolis
200 East Washington Street, City-County Building, Room G-19
Indianapolis, IN 46204

William B. Barfield
M. Robert Sutherland
Michael A. Tanner
BellSouth Corporation
675 West Peachtree St. NE, Suite 4300
Atlanta, GA 30375

Jeffrey S. Hops
Director of Government Relations
Alliance for Community Media
666 11th Street NW, Suite 806
Washington, DC 20001-4542

Leslie A. Vial, Esq.
1320 North Courthouse Road, 8th Floor
Arlington, VA 22201

Emerson Yearwood
Stuart F. Feldstein, Esq.
Fleischman & Walsh, LLP
1400 Sixteenth Street NW
Washington, DC 20036

Gardner F. Gillespie
Jackqueline P. Cleary
Hogan & Harston LP
555 13th Street NW
Washington, DC 20004-1109

Liam S. Coonan
Cynthia A. Barton
175 E. Houston, Room 1216
San Antonio, TX 78205

James D. Ellis
Robert M. Lynch
David F. Brown
175 E. Houston, Room 1254
San Antonio, TX 78205

Norman B. Beecher, Esq.
Becker Stowe Bowles & Lynch PC
1120 Lincoln Street, Suite 1002
Denver, CO 80203

James A. Stenger
Amy Brett
Ross & Hardies
888 16th Street NW, Suite 400
Washington, DC 20006

Stephen R. Effros
James H. Ewalt
Cable Telecommunications Association
3950 Chain Bridge Road
P.O. Box 1005
Fairfax, VA 22030-1005

J. Christopher Redding
Michael S. Schooler
Dow Lohnes & Albertson
1200 New Hampshire Avenue NW
Suite 800
Washington, DC 20036

W. Kenneth Ferree
Henry Goldbert
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, NW
Washington, DC 20026

Michael E. Katzenstein, Esq.
Vice-President and General Counsel
OpTel, Inc.
1111 W. Mockingbird Lane
Dallas, TX 75247

Jean L. Kiddoo
Karen Eisenhauer
Swidler & Berlin, Chartered
3000 K Street NW
Washington, DC 20007

Gregory L. Cannon, Esq.
1020 19th Street NW, Suite 700
Washington, DC 20036